APPENDIX A

COURT OF APPEALS OF OREGON

[Filed May 8, 2002]

C971202CV; A104615

ROGERS MACHINERY, INC.,
Appellant,

v.

WASHINGTON COUNTY and CITY OF TIGARD,
Respondents.

December 13, 1999, Argued and Submitted

JUDGES: Before LANDAU, *Presiding Judge*, and LINDER and BREWER, *Judges*.

OPINION

LINDER, J.

Pursuant to ORS 34.010 *et seq.*, Rogers Machinery, Inc., petitioned for a writ of review to challenge the imposition of a Traffic Impact Fee (TIF) assessed under a Washington County ordinance. Respondents are Washington County and the City of Tigard, which jointly administer the ordinance.[1] The TIF is assessed against property developers to provide funds for improvements to city streets and arterials. Petitioner challenges the TIF assessed against it as a taking of its

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[1] The ordinance establishing the TIF was approved by Washington County voters in November 1990. In 1994, Washington County and the City of Tigard entered into an intergovernmental agreement, pursuant to which the city administers the TIF as to property within the city limits. Relevant portions of the TIF are set out in the discussion below.

property without just compensation, in violation of the Fifth Amendment to the United States Constitution.[2] Petitioner also argues that the TIF ordinance violates state statutes governing system development charges (SDCs). We review to determine whether, in upholding the assessment, the trial court misconstrued the applicable law. ORS 34.040(1)(d), (e); *Johnson v. Civil Service Board*, 161 Ore. App. 489, 498, 985 P.2d 854, on recons 162 Ore. App. 527, 986 P.2d 666 (1999). We affirm.

The facts relevant to our review are not disputed. Petitioner operates a business that has its headquarters in the City of Tigard. Because of crowding in the existing headquarters building, petitioner decided to construct a second building on the same site. Petitioner planned to relocate approximately 40 employees from the existing building to the new one. In February 1997, petitioner applied for a building permit for the new building. After reviewing the permit application and other materials relating to the proposed development, the city determined that, under the TIF ordinance, petitioner's proposed development fit the use category of "general light industrial." Applying the formula applicable to that category, the city assessed a TIF of $37,102.[3]

Petitioner filed an administrative appeal of the assessment, raising its statutory and constitutional challenges to the TIF. *See* Washington County Code (WCC) § 3.17.110 (providing for appeals seeking refunds of monies collected under the

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[2] The Takings Clause of the Fifth Amendment to the United States Constitution provides, in part:

> "Nor shall private property be taken for public use, without just compensation."

Petitioner does not raise a challenge under the parallel provisions of Article I, section 18, of the Oregon Constitution.

[3] The manner in which the calculation is made pursuant to the ordinance is described below.

TIF). After a hearing, a county hearing officer issued an order upholding the assessment generally but directing it to be recalculated based on the hearing officer's conclusion that the proposed development fit into three relevant use categories. The city recalculated the assessment, apportioning it according to the uses identified by the hearing officer and applying current rates; the recalculated assessment was $ 37,018.

After paying the assessment, petitioner brought this writ of review proceeding in circuit court, asserting that the TIF violates the federal Takings Clause. In particular, petitioner argued that the TIF is invalid under the individualized "rough proportionality" test announced in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). Petitioner also challenged the TIF as inconsistent with certain provisions of ORS chapter 223 relating to systems development charges.

In response to petitioner's federal constitutional challenge, respondents argued that the Takings Clause and *Dolan*'s rough proportionality test do not apply to the TIF, for three reasons: (1) the TIF is a tax, not an exaction; (2) the TIF is not the result of an ad hoc adjudicative decision; and (3) the TIF, even if it is an exaction, does not require the dedication of property. Respondents argued alternatively that, even if the test announced in *Dolan* applies to the TIF, the ordinance satisfies that test. In response to petitioner's claim that the TIF violates portions of ORS chapter 223, respondents argued that ORS chapter 223 does not apply to the TIF because it is a tax and not a systems development charge. Respondents asserted further that, if ORS chapter 223 does apply, petitioner's challenge to the TIF as inconsistent with that statutory scheme is both untimely and without merit. The circuit court rejected petitioner's challenge to the TIF, reasoning that the TIF is a tax and that *Dolan* therefore does not apply to it. The circuit court further concluded that the TIF is "compatible" with the provisions of ORS chapter 223 relating to systems development charges.

On appeal, the parties renew the arguments they made below.[4] We begin by describing the provisions of the ordinance and the assessment that it authorizes. We then consider petitioner's claim that the TIF is invalid under the statutes relating to system development charges. *See State v. Kennedy*, 295 Or 260, 262-65, 666 P.2d 1316 (1983) (statutory issues should be resolved before reaching constitutional issues). Because we reject that challenge, we finally consider petitioner's claim that the TIF violates the federal Takings Clause.

I. THE ORDINANCE IMPOSING THE TIF

Washington County first adopted the ordinance authorizing the TIF in 1985. In 1990, the ordinance was amended to apply to cities and was readopted as amended. The ordinance is codified in the Washington County Code as chapter 3.17 and, at the outset, identifies its purpose and scope as follows:

> "A. This tax is adopted to ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development.
>
> "B. This tax shall provide funds for extra capacity improvements to county and city arterials and certain collectors or state facilities. It applies throughout the county, including within incorporated cities."

WCC § 3.17.020.

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[4] By amendment at trial of its petition for writ of review, petitioner also sought restitution in the amount of the difference between the assessment imposed after its appeal, based on the new rate, and the assessment that would have been imposed using the rates in effect before its appeal. The circuit court rejected petitioner's argument in that regard, and petitioner assigns error to that ruling. We conclude that the circuit court did not err and that the issue does not merit further discussion. We therefore confine our decision to petitioner's statutory and constitutional challenges to imposition of the TIF.

Section 3.17.050 describes the method for determining the amount of the assessment to be imposed. In effect, under that section and Appendix A of the ordinance, the assessment depends on the type of use proposed for the new development. As pertinent here, the ordinance specifically provides:

> "A. The amount of the tax due shall be determined by multiplying the following applicable dollar amount, adjusted as provided in subsection E of this section, by the number of average weekday trips generated by the new development in accordance with the basis for trip determination set forth in Appendix A attached hereto and incorporated herein.
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> "* * * * *
>
> "Office use $ 124 per average weekday trip
>
> "Industrial use $ 130 per average weekday trip
>
> "* * * * *
>
> "B. In the event an identified use does not have a basis for trip determination stated in Appendix A, *i.e.*, not available, the director [5] shall either:
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> "1. Determine the trip generation based on the use listed in Appendix A most similar in traffic generation; or
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> "2. At the election (and expense) of the applicant, consider actual trip generation of a same or similar use verified by a registered traffic engineer. In the event actual trip generation is utilized, the director may make such adjustments as he deems applicable in consideration of location, size and other appropriate factors in determining the average weekday trip.

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[5] The "director" is the director of the county department of land use and transportation or, in those cities that collect and administer the tax themselves, the person charged with those duties. WCC § 3.17.020(O).

"C. It is recognized that single structures may include more than one use. In such event the director for purposes of establishing the traffic impact fee shall proportion the uses accordingly.

"D. The applicant shall, at the time of application for a building permit, provide the department with necessary and applicable information, such as the type of use, number of employees or square footage of structures, necessary to calculate the traffic impact fee."

Appendix A further sets out various specific land use categories (which are listed under the general categories of "residential," "institutional," "business and commercial," "office," and "industrial,"), the bases for "trip determination" for those categories (e.g., square footage, number of employees, or similar criteria), and the weekday and weekend average trip rates that apply to the various uses.[6] Using those calculations, the amount of the fee is then determined by applying a "weighted average daily" trip rate formula for the use.

WCC § 3.17.050(A).

Under subsection E of section 3.17.050, the dollar amounts specified in subsection A are subject to yearly increases of six percent or, if determined to be a "more accurate estimate of the increase or decrease in construction costs," they can be increased or decreased based on a "construction cost index" prepared and maintained by the county. In all events, any increase in the dollar amounts may not exceed six percent.

The tax is "due and payable at the time of issuance of a building permit[.]" WCC § 3.17.060(A). If the amount due

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[6] The record shows that the City of Tigard used the Institute of Traffic Engineers (ITE) Trip Generation Manual, 4th Edition, in determining the land use categories applicable to particular developments. The record, however, does not include a copy of the manual.

for any one building exceeds $5,000, an applicant may request a "payment deferral," in which event payment is due when the occupancy permit issues. WCC § 3.17.060(B). Applicants may finance their TIF obligations with "Bancroft Bonding" under ORS 223.205 to ORS 223.295. *See* WCC § 3.17.060(C). The ordinance also provides for certain credits and offsets against the TIF obligation. For example, an applicant is entitled to a credit for constructing certain "eligible capital improvements," such as "extra capacity road or transit" improvements and improvements constructed "to address a safety hazard. "WCC § 3.17.070(A) and (B). If a developer files a written request for an offset within a specified time period after the assessing authority's acceptance of the traffic safety improvement, the developer is reimbursed for the cost of the improvement from TIF funds collected directly from that developer. WCC § 3.17.080. Developers may also apply for refunds of TIF payments. Refunds are granted upon a finding by the director of a clerical error in their calculation or, if the refund is timely requested, for failure to claim a credit or offset. WCC § 3.17.110.

Revenues generated by the TIF are deposited into dedicated funds. Under section 3.17.090(A), the funds "shall be used for no purpose other than those activities described as, or for the benefit of, extra capacity facilities as defined herein." Pursuant to section 3.17.100, authorized expenditures include those for new or expanded arterial and collector road projects, extra capacity transit projects, and the costs of administering the TIF assessments and the projects they fund. The county is required to review the TIF annually to ensure that revenues neither exceed nor fall short of amounts needed for identified extra capacity demands. WCC § 3.17.140.

An appeal is available to "any citizen or other interested person" to challenge an expenditure of TIF revenues. WCC § 3.17.150(A)(1). Also, any person "aggrieved by a dis-

cretionary decision of the director may appeal the decision to the county hearings officer." WCC § 3.17.150(B)(2). The decision of the county hearings officer is reviewable solely under ORS 34.010 through ORS 34.100 (writ of review) in circuit court. WCC § 3.17.150(B)(5).

II. PETITIONER'S STATUTORY CHALLENGE

As earlier noted, we begin with petitioner's statutory challenge to the TIF. Petitioner argues that the TIF is a "system development charge" and therefore must comply with the provisions of ORS chapter 223 governing such charges.[7] Specifically, petitioner contends that the TIF is an "improvement fee" as defined in ORS 223.299(2), which is one of two types of fees that qualify as a SDC. Petitioner asserts that the ordinance establishing the TIF fails to comply with the calculation methodology required by ORS 223.304(2) and that the TIF therefore is invalid.

Respondents answer with three arguments. First, both respondents assert that the TIF is a tax, not a fee or an assessment, and that it therefore is not subject to the statutes governing SDCs. The county argues alternatively that, even if the TIF is subject to those statutes, petitioner's challenge is time-barred. Finally, the city argues that, in all events, the TIF complies with the methodology required by ORS 223.304(2) and that petitioner's challenge therefore fails on the merits.

The threshold issue is whether the TIF is subject to the statutes governing SDCs. *See* ORS 223.297 to ORS 223.314. The express purpose of that statutory scheme is "to provide a uniform framework for the imposition of system development charges by governmental units for specified purposes and to

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[7] The statutes have been amended since this case arose in ways not pertinent to this case. *See* Or Laws 2001, ch 662, §§ 2-6 and Or Laws 1999, ch 1098, § 2. We cite the pre-amendment versions of the relevant statutory provisions.

establish that the charges may be used only for capital improvements." ORS 223.297. SDCs are defined as: "[A] reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a building permit or connection to the capital improvement." ORS 223.299(4)(a). A reimbursement fee is a fee for "costs associated with capital improvements already constructed or under construction." ORS 223.299(3). An improvement fee is a fee for "costs associated with capital improvements to be constructed." ORS 223.299(2). "Capital improvements" refers to facilities or assets used for specified purposes, such as water supplies, waste water collection, and transportation. *See* ORS 223.299(1). Finally, in addition to describing what is included in the term "system development charge," the statutory scheme also specifies what is not included. For example, fees assessed or collected by local improvement districts are expressly excluded, as are the costs of complying with requirements or conditions of land use decisions. ORS 223.299(4)(b).

In light of the plain language of those definitions, we agree with petitioner that the TIF at issue in this case qualifies as an "improvement fee." It is a charge for costs associated with a future capital improvement (*i.e.*, transportation infrastructure). The charge, moreover, is assessed or collected when a development permit issues (subject to provisions to defer payment). The TIF, quite simply, squarely fits what the statutes describe.

In arguing to the contrary, respondents focus on the fact that the ordinance, although it terms the collection a "traffic impact fee," otherwise refers to it as a tax. *See, e.g.*, WCC § 3.17.010 (entitling the chapter the "Washington County traffic impact fee ordinance"); WCC § 3.17.030 (defining "fee" to mean "the traffic impact tax adopted herein"). But nothing in the statutory scheme suggests that the label given

to a particular charge is significant in determining whether it qualifies as a SDC. Rather, the statutes describe the charges they govern in substantive terms—that is, by the types of capital improvements, past or future, that the charges fund (*e.g.*, transportation improvements), and by the process by which the assessment is made (*e.g.*, in connection with issuance of a development permit). The legislature deemed it appropriate to exempt some charges, such as costs for compliance with land use conditions, that might otherwise fit the statute's definitions. The legislature, however, provided no such exemption for local "taxes" assessed against new development to fund the cost of capital improvements necessitated by such development. To the contrary, the legislature expressly declared its goal of establishing a "uniform framework" for imposition of systems development charges, a goal that would be undermined if labels, rather than substance, determined the statutory scheme's reach. We therefore conclude that the statutes pertaining to SDCs apply to the TIF.

The next question is whether, as the respondent county argues, petitioner's claim that the TIF is invalid under the statutes is time barred. In that regard, petitioner's only argument under the statutory scheme is that the TIF does not comply with ORS 223.304(2), which provides, in part:

> "Improvement fees shall be established by ordinance or resolution setting forth a methodology that considers the cost of projected capital improvements needed to increase the capacity of the systems to which the fee is related."

Petitioner's position is that, to comply with the methodology required by that provision, the funds collected from a particular developer must be used to address the specific impacts of the proposed development, rather than to finance jurisdiction-wide improvements to increase the capacity of

the affected systems more generally. According to petitioner, the funds collected through the TIF do the latter, not the former, and the TIF therefore is invalid.

We agree with the respondent county that petitioner's challenge in that regard is untimely. ORS 223.304(5) provides:

> "No legal action intended to contest the methodology used for calculating a system development charge shall be filed after 60 days following adoption or modification of the system development charge ordinance or resolution by the local government."

Petitioner does not suggest that its challenge is something other than one to the methodology used for calculating the TIF or that the 60-day time limitation does not by its terms apply. Instead, petitioner argues only that the limitation should not be enforced in this instance because, until petitioner sought a development permit, it had no incentive to bring its challenge. But the statute contains no exceptions. Nor does petitioner challenge the validity of the statute imposing a time limitation on such challenges. Petitioner appears merely to invite us to decline to apply the statute to it on policy grounds. We have no authority to do so. Consequently, the circuit court correctly rejected petitioner's statutory challenge.

III. PETITIONER'S TAKINGS CLAIM

We next consider petitioner's argument that the TIF is an uncompensated taking of its property, in violation of the federal constitution's Takings Clause. In resolving that claim, we begin by addressing respondents' preliminary assertion that the TIF is not subject to a Takings Clause analysis because it is a tax.

Respondents are correct that, generally, the Takings Clause does not apply to taxes. *See Penn Central Transp. Co. v. New*

York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (the taxing power is "one obvious example" of an exercise of government power that affects property or economic interests without giving rise to takings claims); *see also Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699, 704 (9th Cir 1997), *cert den*. 522 U.S. 966, 139 L. Ed. 2d 315, 118 S. Ct. 411 (1997) (holding that a recycling service charge was analogous to a property tax and therefore not subject to challenge as a taking of property). In contrast, special assessments or user fees for services, such as improvements to community infrastructures, have "traditionally been 'deemed to be part of the police power and not of the power of taxation.'" *Scappoose Sand and Gravel, Inc. v. Columbia County*, 161 Ore. App. 325, 333, 984 P.2d 876, *rev den* 329 Or 528, 994 P.2d 129 (1999) (citing *Sproul v. State Tax Com.*, 234 Or 579, 591, 383 P.2d 754 (1963)). Thus, user fees, assessments, and similar collections at least potentially are subject to takings analysis. *See, e.g., United States v. Sperry*, 493 U.S. 52, 60, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) (takings analysis applied to fees used to defray the federal government's expenses in providing a claims tribunal).

We decline to resolve petitioner's constitutional challenge on the basis that the TIF qualifies as a tax, however, for two reasons. First, the TIF has characteristics of both a tax and a special assessment or similar fee and therefore defies ready classification as either. Traditionally, taxes and assessments have been distinguished as follows:

> "In the most general sense, a tax is 'any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name.' Black's Law Dictionary 1457 (6th ed 1991). An assessment is a government fee imposed on owners of property to finance

> improvements or services directly benefitting that property; an assessment is exempt from constitutional limitations requiring that taxes be uniformly imposed so long as the financial burden and the private benefit are closely related. *King v. Portland*, 38 Or 402, 63 Pac 2 (1900), *aff'd* 184 U.S. 61, 22 S. Ct. 290, 46 L. Ed. 431 (1902)."

Automobile Club of Oregon v. State of Oregon, 314 Or 479, 485-86, 840 P.2d 674 (1992) (footnote omitted). The TIF at issue in this case is fee-like in that it is collected only from persons whose activities give rise to a need for government to exercise its power to build, expand, or improve the transportation facilities of the community. *See generally Sproul*, 234 Or at 592-93 (when the cost of a governmental expense is to be paid only by persons causing government to incur the expense, limitations on governmental taxing authority do not apply). On the other hand, the TIF is spent in ways that make it more like a tax. That is, the collections are pooled into a fund that is used to serve the general public by improving the capacity of city streets and arterials within the jurisdiction generally. The funds are not spent only or necessarily on improvements that are directly tied to the developed property, such as, for example, improving the access from the development to the adjacent street. The TIF thus has a hybrid quality.

Second, any resolution based on the parties' tax-versus-fee debate would not be responsive to petitioner's argument, which is that the characterization does not matter. What matters, according to petitioner, is that the government took petitioner's property (here, money) as a condition for developing petitioner's land. Petitioner views Dolan as subjecting any such monetary exaction, whether considered a tax or a fee, to an individualized "rough proportionality" analysis under the federal Takings Clause. Consequently, even were we to characterize the TIF as a tax, that characterization

would not meet petitioner's challenge. We must, in all events, examine the Supreme Court's Takings Clause jurisprudence and the extent to which the holding in Dolan applies to the assessment at issue in this case. We therefore turn to that examination.

Federal Takings Clause Jurisprudence

At the outset, it is helpful to clarify the nature of the collection that petitioner seeks to invalidate in this case. The challenged TIF, whether deemed a tax or a form of assessment, unquestionably is what in land use parlance is termed an "impact" or "development" fee. Local governments and municipalities often impose such charges on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally, more intensified development to occur. As described in one academic treatment of the subject:

> "Exactions can take various forms, including in-kind dedications for infrastructure, such as roads, parks, and schools, and 'in lieu' fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development. The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community."

Abraham Bell and Gideon Parchomovsky, Givings, 111 Yale LJ 547, 609 (2001) (footnotes omitted). The TIF's character as an exaction is what gives rise to the particular legal dispute in this case.

Exactions do not fit neatly within the more conventional Takings Clause analytical construct. Traditionally, takings jurisprudence has distinguished between two kinds of encroachments on property interests, with significantly different

analyses applicable to each. The first is an actual physical invasion or occupation of property, whether in the form of a physical trespass or a forced dedication, as a result of which some portion of the property may be used by others. The Fifth Amendment is particularly protective of property against that form of encroachment, and physical invasions or diminutions of rights of exclusive possession have been deemed to be per se takings that entitle a property owner to compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Such an invasion is unconstitutional "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35.

The same is not true, however, of the second traditionally recognized type of government encroachment on property interests, namely, regulatory restrictions on property uses (e.g., zoning). In testing use restrictions, no "set formula" determines whether an unconstitutional taking has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Instead, a court must engage in an essentially ad hoc, factual inquiry that considers whether the land use regulation "substantially advances legitimate state interests" and "does not deny an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *see also Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (land use regulations are tested under the Takings Clause to determine whether they are reasonably related to legitimate public interests). Thus, when the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.

Dolan, and the case that foreshadowed it, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), were decided against that landscape.

Both cases involved development conditions that, in effect, required the landowner to forfeit part of his or her property in exchange for approval to develop. The Court therefore was confronted with a blend of the governmental encroachments described above. On the one hand, the challenged government action involved a regulatory use restriction in the form of a restriction on further development. Traditionally, such a restriction would have triggered a lenient takings standard. On the other hand, as a condition of relaxing the use restriction, the government required the property owner to suffer a physical occupation or invasion. Traditionally, such an invasion would have been considered a per se taking. The issue for the Court was how to test that amalgamation.

The facts of the cases provide context that is helpful to understanding the Court's resolution of that issue. In *Nollan*, the plaintiffs sought approval from a California agency to rebuild a beachfront house. The agency granted the approval, subject to the condition that the plaintiffs dedicate a public easement behind their house, along the shore, so that the public could pass freely between the two public beaches bordering the plaintiffs' property. In invalidating the dedication, the Court accepted as legitimate the agency's concern that the house that the plaintiffs proposed to build would block visual access to the beach and create a "psychological barrier" to its use by the public. But the Court considered the requirement of a public easement behind the house to be unrelated to that interest, because it did nothing to enhance visual access of the beach from the street or to overcome any psychological barrier. Instead, the easement merely facilitated use of the public beaches by people already aware of and using them. The Court concluded that the dedication therefore lacked an "essential nexus" between the condition imposed and the government interest in imposing it, which rendered the dedication a taking. *Id.* at 841-42. In short, although the Court declined to deem the condition a per se taking as it had for other physical invasions or dedications of property

interests, the Court required that there be a logical connection between the governmental interest to be served and the particular condition imposed on the landowner.

There was, however, a second shoe to drop, and the Court signaled as much in *Nollan*. In *Nollan*, because the Court determined that no connection existed between the dedication and the government's interest in imposing it, the Court did not have to decide how close a nexus is required between the two to avoid an unconstitutional taking; it therefore identified the issue but declined to resolve it. *Id.* at 838. Several years later, the Court granted certiorari in *Dolan* for the express purpose of settling that unresolved issue. 512 U.S. at 377.

In *Dolan*, the property owner sought to double the size of her retail store and to pave her parking lot. As a condition of allowing the development, the city required the owner to dedicate a 15-foot strip of land for use as a pedestrian path and bikeway and also to dedicate a portion of her property within the 100-year flood plain for a publicly accessible "greenway." The city defended the bikeway requirement with a calculation that the increased size of the retail store would add 937 car trips per week and that the bikeway "could" help to offset the increased traffic. The city defended the flood plain dedication on the basis that paving the gravel parking lot would increase the amount of impermeable ground, thus adding to flooding from the adjacent and already over-burdened creek. *Id.* at 379-82.

The Court, in examining the dedications, established a two-step inquiry for analyzing regulatory takings claims in the context of conditional use or development permits. First, as it had in *Nollan*, the Court examined whether there was an "essential nexus" between the conditions and legitimate governmental interests, such that the purpose to be served by the condition was the same as the government's interest in the use restriction. The Court found that nexus requirement readily satisfied. More specifically, the Court determined that

there was a logical relationship between relieving traffic congestion and requiring a bike path and between the increased risk of flooding due to the parking lot and requiring property within the local flood plain to remain undeveloped. 512 U.S. at 387-88.

Second, having determined that the "essential nexus" inquiry was satisfied, the Court turned to the degree of connection between the dedications and the projected impact of the proposed development. *Id.* at 388. The Court began by endorsing the predominant test developed by state courts—*i.e.*, the requirement of a "reasonable relationship" between the condition imposed and the impacts of the development. That test, the Court reasoned, best "encapsulated" what the federal Takings Clause requires. *Id.* at 391. The Court, however, adopted the phraseology "rough proportionality" to avoid confusion with "rational basis" scrutiny, which the Court viewed as appropriate for equal protection rather than takings analysis. *Id.* Thus, the Court held that there must be "rough proportionality" between a development's projected impacts and the exactions required of the property owner as a condition of development. *Id.* The Court emphasized that it was requiring proportionality of only an approximate kind: "No precise mathematical calculation is required, but the city must make some effort to quantify its finding in support of the dedication * * * beyond the conclusory statement that it could offset some of the [impacts of the development]." *Id.* at 395-96. But the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391 (emphasis added). Moreover, the Court made clear that it was departing from the general rule applicable to zoning and other use restrictions that the "burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n 8. Instead, the burden was on the government "to justify the required dedication." *Id.*

Applying the "rough proportionality" prong of the test to the case before it, the Court concluded that the record in *Dolan* was insufficient to satisfy the government's burden. With respect to the dedication of the greenway, the Court observed that the city's interest in not overburdening the adjacent creek was served by keeping the flood plain free of development. But rather than just regulate petitioner's private use of that portion of the property, the city required her to dedicate it to public use as a greenway. The Court concluded that nothing in the record demonstrated any "individualized determination" of the development impacts that would support divesting the owner of her property, rather than regulating her use of it. *Id.* at 393-94. As for the bike and pedestrian pathway, the Court deemed the city's finding that the pathway could offset some of the traffic demand insufficiently precise to justify a dedication of some the landowner's property for public use. *Id.* at 395-96.

As we have observed in *Dolan*'s aftermath, the new obstacle posed to development conditions by *Dolan*'s "rough proportionality" test is not in the standard itself—which the Court viewed as similar to the familiar "reasonable relationship" test. Rather, that obstacle arises from the specificity required in analyzing the impacts of a particular proposed development and comparing them to the nature and extent of the exactions required as a condition of approving the development. *See Art Piculell Group v. Clackamas County*, 142 Ore. App. 327, 340, 922 P.2d 1227 (1996); *J.C. Reeves Corp. v. Clackamas County*, 131 Ore. App. 615, 620, 887 P.2d 360 (1994). *Dolan*'s test also is more rigorous for the government because it places the burden on the government in the first instance to justify the condition as sufficiently proportionate, rather than giving the property owner the initial burden to demonstrate the lack of the necessary relationship between the impacts of the development and the condition imposed. *See Schultz v. City of Grants Pass*, 131 Ore. App. 220, 225, 884 P.2d 569 (1994) (discussing the shift

of burden under Dolan). In departing from the less exacting requirements applicable to zoning and other traditional use regulations, the Court in Dolan explained:

> "Th[ose sort of land use regulations], however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."

512 U.S. at 385. The Court defended placing the burden of justification on the government for related reasons:

> "Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."

Id. at 391 n 8 (citations omitted). Dolan's Application to Legislatively Imposed and Generally Applicable Development Fees—The National Landscape.

We have examined *Nollan* and *Dolan* in other cases that have come before us since the Court issued those decisions.[8] We have done so again in this case to highlight aspects of the decisions that have particular bearing on the issue before us.

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[8] *See, e.g.*, 181 Ore. App. at (slip op at 28-31) (citing cases).

Both *Nollan* and *Dolan* arose in the context of discretionary adjudicative determinations specific to one development proposal on a particular parcel of land. Both, moreover, involved conditions that took the form of a dedication of property for public use. As the decision in each case reveals, those facts played an explicit part in the Court's rationale for adopting a heightened level of scrutiny for the development conditions at issue. But whether those facts are therefore an indispensable predicate for applying that scrutiny has been, and remains, unclear. The two questions that consequently have generated considerable litigation for lower courts are: (1) Does heightened scrutiny apply to nonpossessory exactions, such as development or impact fees like the TIF imposed in this case? (2) Does that scrutiny apply to exactions imposed through generally applicable legislation rather than individual adjudicative decisions?

In the eight years since *Dolan* was decided, no consensus has emerged among lower courts on those questions and, so far, the Supreme Court has declined to grant certiorari in cases that might have provided further guidance. *See, e.g., Parking Association of Georgia v. City of Atlanta*, 264 Ga 764, 450 S.E.2d 200 (1994), *cert den* 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 277 Ill. App. 3d 926, 214 Ill. Dec. 526 (1995), cert den 519 U.S. 976, 136 L. Ed. 2d 325, 117 S. Ct. 413 (1996) (*Dolan* applies to legislatively imposed property development conditions). Lower court authority appears most sharply divided on the issue of *Dolan's* application to monetary exactions. Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the

payment of fees.[9] Other courts have rejected that view, holding that *Dolan* potentially can extend to monetary exactions, at least in some circumstances.[10] A similar split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.[11]

The legislative-versus-adjudicative imposition of a development condition has proved especially significant for courts that have extended *Dolan's* heightened scrutiny test to monetary exactions. With near uniformity, lower courts applying

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[9] *E.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir 1995) (declining to apply *Dolan* to fees imposed on landowners as a condition of exercising their property right to hunt on their own land because no physical occupation is involved); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir 1991), *cert den* 504 U.S. 931, 118 L. Ed. 2d 593, 112 S. Ct. 1997 (1992) (declining to extend holding in *Nollan* to purely monetary exaction); *McCarthy v. Leawood*, 257 Kan 566, 894 P.2d 836 (1995) (concluding that nothing in *Dolan* supports making the critical leap from property dedications to impact fees).

[10] *E.g., Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz 479, 930 P.2d 993, *cert den* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2512 (1997); *Ehrlich v. City of Culver City*, 12 Cal 4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, *cert den* 519 U.S. 929, 136 L. Ed. 2d 218, 117 S. Ct. 299 (1996); *Krupp v. Breckenridge Sanitation Dist.*, 19 P3d 687 (Colo 2001); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, SW 3d (Tex App February 14, 2002); *Benchmark Land Co. v. City of Battle Ground*, 103 Wash. App. 721, 14 P3d 172 (2000), *rev allowed* 143 Wn. 2d 1018 (2001).

[11] *See generally Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995) (Thomas, J., dissenting from denial of certiorari) (collecting lower court cases in conflict); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir 1998) (there is "considerable doubt" about the applicability of the *Dolan* rough proportionality test to "legislative, as opposed to administrative exactions" and to "fee exactions, as opposed to physical exactions").

Dolan to monetary exactions have done so only when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan's* heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes. The California Supreme Court's decision in *Ehrlich v. City of Culver City*, 12 Cal 4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, *cert den* 519 U.S. 929, 136 L. Ed. 2d 218, 117 S. Ct. 299 (1996), together with its more recent decision in *San Remo Hotel v. City and County of San Francisco*, 27 Cal 4th 643, 117 Cal.Rptr.2d 269, 41 P3d 87 (2002), provides one of the more in-depth and thoughtful discussions of the reason for that distinction.

Erhlich involved a development permit for a condominium complex to be built on the site of a former private tennis club. As a condition for the permit, the city required the owner to pay a $ 280,000 fee to be used for city development of recreational facilities. Although the court was divided on some points, a majority held that the fee was subject to *Dolan's* heightened scrutiny test. The plurality decision emphasized that the city had exercised discretionary power in imposing and calculating the fee, rather than doing so pursuant to a legislative mandate or formula. Thus, even though the condition involved the payment of money rather than a dedication of land, the fee had the same potential for illegitimate leveraging that was central to the Court's rationale in *Dolan*. *Ehrlich*, 911 P.2d at 438. The plurality reasoned:

> "There is no question that the takings clause is specially protective of property against physical occupation or invasion—a proposition that the court's opinion in *Loretto* * * * makes clear. It is also true, as the city points out, that government generally has greater leeway with respect to noninvasive forms of land use regulation, where the courts have for the most part given greater deference to its power to impose broadly

> applicable fees, whether in the form of taxes, assessments, user or development fees. [Representative cases] dealt with such legislatively formulated development assessments imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present. Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed—as in this case—neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny in *Nollan* and *Dolan* is triggered."

911 P2d. at 443-44 (emphasis in original).

Justice Mosk, concurring, observed that development fees calculated according to "preestablished legislative formulae based on square footage or per unit of development" bear a close resemblance to excise taxes, assessment fees, and user fees that are tested pursuant to standards that are deferential to the authority of government to impose them. But Justice Mosk agreed with the plurality that *Dolan's* more exacting scrutiny should apply because the disputed fee was not legislatively imposed:

> "[The risk of extortionate behavior on the part of government] diminishes when the fee is formulated according to preexisting statutes or ordinances, which purport to rationally allocate the costs of development among a general class of developers or property owners—indeed, as discussed above, the separation of powers doctrine clothes such a fee in a presumption of constitutionality. But when the fee is ad hoc, enacted at the time the development application was approved,

> there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burden of achieving legitimate government objectives."

911 P2d. at 459-60 (Mosk, J., concurring); 911 P2d. at 465 (Kennard, J., concurring and dissenting) (*Dolan* should apply to the recreation fee because that fee was imposed on the development application individually rather than pursuant to an ordinance or rule of general applicability).

In its more recent decision in *San Remo Hotel*, the California Supreme Court had its first opportunity to authoritatively address the analysis that should apply to a development fee imposed through a generally applicable legislative enactment. The case involved a challenge to a housing replacement fee imposed on hotel owners who proposed to alter the use of their property by renting rooms to tourists or other daily renters, rather than to longer-term residents. If the developer did not want to construct or otherwise bring onto the market alternative housing units, the developer could pay an "in lieu" fee that would help fund government construction of low- and moderate-income housing. *San Remo Hotel*, 41 P3d at 92. Adhering to the distinction it drew in *Erhlich*, the court observed that the sine qua non for application of *Dolan's* heightened scrutiny test was the discretionary deployment of the police power in the imposition of land use conditions in individual cases. 41 P3d. at 105. But the fee in dispute did not qualify as a discretionary condition. Rather, it was one in which "no meaningful government discretion entered into either the imposition or the calculation of the in lieu fee." *Id.* at 104. In particular, because the fee was mandatory for any developer proposing such a conversion who chose not to provide replacement housing, the developer in *San Remo* was not "singled out" for payment of the fee. *Id.*

Nor was the amount of the fee discretionary, because it was determined according to a set formula based on replacement cost, which in turn was based on independent appraisals. *Id.* Thus, the court held, *Dolan* did not apply.

As earlier noted, lower courts extending *Dolan* to development fees almost uniformly have followed the distinction identified in *Erhlich* and *San Remo Hotel*, thus limiting *Dolan* to monetary exactions that are imposed and calculated on a discretionary and adjudicatory basis. *See Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz 479, 486, 930 P.2d 993, *cert den* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2512 (1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P3d 687, 698 (Colo 2002); *Waters v. Montgomery County*, 337 Md 15, 650 A.2d 712, 724 (1994); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, SW 3d (Tex App February 14, 2002). The only case we have identified that explicitly has extended heightened scrutiny to a generally applicable legislatively imposed development fee is *Home Builders Ass'n of Dayton v. City of Beavercreek*, 89 Ohio St 3d 121, 729 N.E.2d 349 (2000).[12] Whether the court in that case actually applied heightened scrutiny, however, is questionable.[13]

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[12] Although petitioner also relies on the decision of the Washington intermediate appellate court in *Benchmark Land Co.*, that case is not helpful authority. It is unclear from the opinion whether the challenged development fee was imposed pursuant to an individualized process or whether it was legislatively mandated and nondiscretionary. The court does not discuss the distinction. The court's opinion merely describes the fee as having been imposed in the course of the city's issuance of a development permit; nothing suggests that the fee is part of a comprehensive, detailed, and nondiscretionary legislative conditioning process. *See Benchmark Land Co.*, 14 P3d at 172-73.

[13] The Home Builders Ass'n of Dayton, decision, although stating that *Dolan* should apply, did not seem to adhere to that test in its analysis. The court determined that the first prong of the *Nollan/Dolan* test ("essential nexus") was satisfied by a showing that the "methodology" used to

Oregon Jurisprudence and Analysis of the TIF

Our own cases have sorted through some, but not all, of the questions left unanswered by the Court's decisions in *Nollan* and *Dolan*. In particular, we have been called on to decide whether heightened scrutiny should be extended to legislatively authorized dedication requirements. The first of those cases was *Schultz*, in which a local ordinance authorized and required dedications in exchange for development permits. The city argued that the legislative authorization for the dedications distinguished them from those imposed in *Dolan*. In rejecting that argument, we first observed that the petitioners were not challenging the validity of a "legislative or quasi-legislative enactment that is applied generally to all similarly situated properties" but were, instead, challenging imposition of a particular set of conditions applied to their particular property. *Schultz*, 131 Ore. App. at 227. In other words, we appear to have suggested that there were

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determine the need for a traffic impact fee was based on "generally accepted traffic engineering practices." *Home Builders Ass'n of Dayton*, 729 N.E.2d at 356. The court determined that the second prong of the test ("rough proportionality") was satisfied by the existence of a "reasonable relationship" between "the fee paid and the benefits accruing to developers." *Id.* at 358 (emphasis added). The court made no individualized assessment of proportionality at all but instead reviewed the legislation from a facial perspective as it applied to developers generally. The court's analysis is difficult to square with *Dolan* and, in fact, mirrors the more deferential test traditionally used for user fees and other purely monetary assessments. *See, e.g., Sperry*, 493 U.S. at 60-66 (fee charged to support a government service is not tested for proportionality in specific individual cases but must simply be a "fair approximation of the cost of benefits" provided by the government-funded program that the fee supports); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (similar holding).

significant discretionary aspects to the land use decision in that case. We further observed:

> "[Even if the city is correct that the decision to impose the conditions is a legislative one,] the character of the restriction remains the type that is subject to the analysis in *Dolan*. In drawing its distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are 'not simply a limitation on the use' to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government. That is precisely the nature of the exaction imposed by the city in this case."

Id. (emphasis added; citation to *Dolan* omitted). Thus, our resolution was predicated explicitly on the nature of the condition involved in that case, namely, a physical occupation of property in the form of a dedication of property. We have since adhered to that position, at least in the context of property dedications that, although legislatively authorized, have involved discretion in determining the actual nature and scope of the condition to be imposed. *See J.C. Reeves Corp.*, 131 Ore. App. at 623-24, 623 n 1. We also have since reserved the question of whether we would reach the same conclusion for dedications imposed pursuant to legislatively adopted criteria that are "sufficiently detailed and uniformly applied to obviate" *Dolan's* concerns about ad hoc exactions. *McClure v. City of Springfield*, 175 Ore. App. 425, 435 n 6, 28 P3d 1222 (2001).

In *Clark v. City of Albany*, 137 Ore. App. 293, 904 P.2d 185 (1995), *rev den* 322 Or 644, 912 P.2d 375 (1996), we also held that monetary exactions can be subject to heightened scrutiny under *Dolan*. In *Clark*, a city required a developer, as part of a site approval process for construction

of a fast-food restaurant, to restrict his use of the developed property in certain ways and to make improvements to the site as well as to property adjacent to the site. We concluded that "not all conditions of approval come within the ambit of the *Dolan* test" and we held, in particular, that conditions requiring traffic-free areas on the site and site modifications (such as meeting storm drainage requirements) were use regulations, not exactions subject to *Dolan*. *Clark*, 137 Ore. App. at 300, 301-02. We reached an opposite conclusion, however, with respect to the condition that the developer fund adjacent street improvements. We explained:

> "For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose. The fact that the developer retains title in, or never acquires title to, the property that he is required to improve and make available to the public, does not make the requirement any the less a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records."

Id. at 300. Thus, *Clark* became authority for the proposition that monetary exactions, as well as dedications, could be subject to *Dolan's* heightened scrutiny test.[14]

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[14] *Clark*, however, did not necessarily settle the question of whether a requirement to pay money in exchange for a development permit or other approval necessarily falls within the range of exactions subject to analysis under *Dolan*. A few years after we decided *Clark*, the Supreme Court issued its decision in *Del Monte Dunes at Monterey, Ltd.*, which involved a development denial, rather than a permit conditioned on either a monetary exaction or dedication of property. In its opinion, the Court refused to subject the denial to *Dolan's* heightened scrutiny test, cautioning that it had not "extended the rough-proportionality test of

But *Clark* involved an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee. We therefore did not have the occasion in *Clark* to consider or decide whether *Dolan* extends to any and all monetary assessments imposed as part of a development approval, nor did we purport to make such a global holding. To the contrary, we held only that the adjacent street improvements required in that case were subject to *Dolan*, while also expressly cautioning as part of that holding that the case was otherwise "not the appropriate one for universal line-drawing." *Id.*[15]

Dolan beyond the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 701 (emphasis added). Other courts have noted the Court's comment and, because of it, have either declined or expressed reluctance to apply Dolan's analysis to exactions that do not involve property dedications. *See, e.g., Clajon*, 70 F.3d at 1578; *Krupp*, 19 P3d at 698. This is not an appropriate case to reexamine *Clark* in light of City of Monterey or other later jurisprudential developments because this case can be resolved on the more narrow ground of whether *Dolan* correctly extends to generally applicable legislatively imposed development fees.

[15] Our decisions in *Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Ore. App. 272, 991 P.2d 1080 (1999), *rev den* 330 Or 331 (2000), and Art Piculell Group also applied *Dolan* to zoning ordinances requiring developers to agree to dedications and other exactions as conditions of development. The challenge in *Lincoln City Chamber of Commerce* was a narrow one: whether the city could place the burden on the developer to submit an engineering report addressing proportionality issues. Although we did not explicitly address *Dolan's* application to legislatively authorized monetary exactions, we did observe that the conditions authorized by the ordinance were subject to *Dolan* because they were imposed pursuant to an individualized adjudicative process. *Lincoln City Chamber of Commerce*, 164 Ore. App. at 277-78. We did not discuss the legislative/adjudicative distinction at all in *Art Piculell Group*, but our description of the conditions imposed in that case makes clear that the process involved was adjudicatory and ad hoc in nature. 142 Ore. App. at 329-30.

This case therefore presents us with the first opportunity to consider whether development or impact fees, when imposed on broad classes of property and when calculated pursuant to a legislatively set formula, are subject to *Dolan's* heightened scrutiny test. In that regard, petitioner asserts that the TIF is imposed through an ad hoc adjudicatory process. But petitioner does not explain how that is so, nor does the legislative scheme itself support petitioner's assertion.

To the contrary, by the terms of the ordinance, imposition of the TIF is mandatory on "all development in the county, including inside cities," subject to only a few specified exceptions (*e.g.*, remodeling of single- and multi-family structures and remodeling of commercial, business, and industrial structures in ways that do not generate additional average weekday trips). *See* WCC § 3.17.040(B). Appendix A to the ordinance, which lists the land use categories to which the TIF applies, consists of more than 110 specifically identified uses falling under the more general headings of residential, institutional, business and commercial, and office uses. The list, while perhaps not exhausting the full universe of possible land uses, at the least is very comprehensive. For example, residential uses include single-family detached housing, retirement communities, mobile homes, and different categories of apartment and condominium complexes. Institutional uses span too large a group to canvass here. To give only a few examples, however, they encompass such things as waterways, marinas, railroad terminals, airports, theaters, camps, schools, dog/horse/auto race facilities, churches, nursing homes, hospitals, military bases, and courts. Business and commercial uses are likewise too numerous to list here. But they include hotels, retail stores, specialty retail stores, stores that sell particular products (*e.g.*, lumber, apparel, tires, hardware/paint, and so on), shopping centers based on overall size, restaurants of various kinds, car washes, car dealerships, service stations, and even video arcades. Finally, office uses encompass, among others,

clinics, general office space (based on size), medical offices, insurance office, industrial parks, warehouse facilities, federal post facilities, and utility offices. *See generally* WCC ch 3.17, Appendix A.

For each listed use, the ordinance specifies the "basis for trip determination" (BTD) that applies. Thus, as examples, the BTD for a utility office is the number of employees; for a service station, it is the number of pumps; for a nursing home, it is the number of beds; for a school, it is the number of students; for single family housing, it is the number of units of housing; for a movie theater, it is the number of parking spaces provided; for a city park, it is acreage; for a commercial shopping center, it is gross leasable square footage. *Id.*

Finally, the ordinance expressly sets the fee amount charged for each trip that the development potentially can generate. Residential, office, and industrial developments are charged $135, $124 and $130, respectively, per average weekday trip. Business and institutional developments are charged $34 and $56, respectively, per average weekday trip. WCC § 3.17.050(A).[16]

As that overview of the TIF ordinance reveals, no significant discretion is involved in the TIF's imposition or calculation. Imposition of the TIF is mandatory on broad classes of property. Indeed, nearly all proposed development that conceivably would burden the street and arterial infrastructure within the county is subject to the mandatory

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[16] As earlier noted, the rates increased after petitioner pursued its initial administrative appeal. The significance of the rates, and the point of our citation to them, is not their actual dollar amount but the degree to which the ordinance itself sets the basis for calculation of the TIF rather than having it depend on an adjudicatory exercise of discretion.

fee. Calculation of the fee is, likewise, nondiscretionary.[17] To be sure, because different uses vary in the burden they place on street and arterial infrastructure, the legislation uses a classification scheme to adjust the fee based on those differences. Such classification is common for any number of generally applicable legislative tax, fee, and other assessments; legislative classifications do not render the scheme adjudicatory or discretionary. The TIF ordinance is, in short, precisely the kind of detailed and uniformly applied legislative assessment scheme that courts in other states hold does not fall within the express reach or the implicit rationale of Dolan's heightened scrutiny test.

The only remaining question, then, is whether we agree with those courts. We do. In our view, the reasoning set out by the California Supreme Court in its opinions in *Erhlich and San Remo Hotel*, which we described earlier, is

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[17] An element of discretion can enter into the calculation of the TIF if the proposed development does not fall into one of the use categories listed in section 3.17.050, Appendix A, a situation that is not implicated here. In that circumstance, the director of the department of land use and transportation (or a city officer designated to administer the TIF) is directed to base the TIF on the use or uses listed in Appendix A that are most similar in traffic generation to the use proposed by the developer. WCC § 3.17.050(B)(1). At the developer's election and expense, the director may alternatively consider actual trip generation information as verified by a registered traffic engineer. In that circumstance, the director then may adjust the basis for calculating the fee, considering the "location, size and other appropriate factors in determining the average weekday trip." WCC § 3.17.050(B)(2). Again, this case does not involve a use that does not fit within one or more of those specified in Appendix A, and the director's discretion in that regard is not implicated. We therefore need not determine whether the nature of that discretion is sufficiently channeled by objective criteria, including the engineering evidence that the developer itself provides, that it avoids the kind of ad hoc adjudicatory decision that troubled the Court in *Dolan*. *See San Remo Hotel*, 41 P3d at 104 (fact that in lieu fee involved calculation on the basis of real estate appraisals did not render it discretionary or ad hoc).

persuasive. As our own discussion of *Nollan/Dolan* highlights, and as *Erhlich* and *San Remo Hotel* accurately observe, the two-pronged heightened scrutiny that the Court adopted in *Dolan* was animated by the Court's particular concern with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions. The Court also was expressly concerned with the nature of the conditions imposed—i.e., dedications of property to public use. The nature of the exaction involved here—a monetary assessment in the form of a traffic impact tax or fee—coupled with its imposition and calculation through a detailed legislative formula meaningfully distinguishes this condition from those in *Nollan/Dolan*. As the court in *San Remo Hotel* recognized:

> "While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.
>
> "* * * * *
>
> "Finally, we should not lose sight of the constitutional background. To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions—taxes, special assessments, and user fees--has been accorded substantial judicial deference."

41 P3d at 105-06 (Mosk, J., concurring) (internal quotation marks omitted) (citing *Ehrlich*, 911 P.2d at 429)).

We agree with that reasoning and adopt it. We also agree with the concurring opinion in *Erhlich*, which rhetorically observed that there would be little sense in using a deferential standard of review for taxes and other general assessments, while simultaneously using a more exacting standard for development fees that differ only in how they are spent:

> "If a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional scrutiny required when, as in the case of generally applicable development fees, the 'tax' is earmarked for use in alleviating specific development impacts rather than for the general fund?"

Erhlich, 911 P.2d at 455 (Mosk, J., concurring) (emphasis added). Our response is equally rhetorical: Why indeed? There is no principled basis on which to distinguish generally applicable development fees that fund the infrastructure expansion needed to support new development from other legislatively imposed and generally applicable taxes, assessments, and user fees. We therefore join the several courts in other jurisdictions that have held that *Dolan* does not apply to such legislatively imposed and calculated development fees.

That conclusion resolves petitioner's constitutional challenge in this case. Petitioner's only argument is that the TIF is a taking because the city did not make a sufficiently individualized determination of the traffic impacts that would be generated by his particular development proposal. Because we hold that the more exacting scrutiny required under *Dolan* does not apply to the TIF, no individualized determination was necessary. Petitioner does not challenge the TIF on any other takings theory and, consequently, the trial court properly dismissed the writ.

IV. CONCLUSION

To review, we reject petitioner's statutory as well as its constitutional challenges to the imposition of the TIF in this case. Regarding petitioner's statutory challenge, we agree

with petitioner that the TIF qualifies as a system development charge (SDC) and that it therefore generally must comply with the provisions of ORS chapter 223 governing such charges. Petitioner's only statutory challenge is that the TIF does not comply with the requirement in ORS 223.304(2) that SDCs be calculated using "a methodology that considers the cost of protected capital improvements needed to increase the capacity of the systems to which the fee is related." That challenge is barred by ORS 223.304(5), which requires that it have been brought within 60 days after the adoption or modification of the TIF ordinance.

Regarding petitioner's federal takings claim, our prior cases have held that monetary exactions imposed through ad hoc adjudicatory challenges can be subject to *Dolan's* heightened scrutiny, as can be legislatively authorized dedications of property. But the prior cases presenting those issues all have involved authorizing legislation that left significant discretion in the identification and imposition of the particular conditions to be applied to individual development proposals. Until this case, we have not had the opportunity to authoritatively resolve whether *Dolan* also extends to a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee. We conclude that the TIF is such an assessment, and we are persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan*'s heightened scrutiny test does not extend to development fees of that kind. We therefore conclude that the trial court correctly rejected petitioner's constitutional challenge to the TIF.

Affirmed.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A0465
SC S49535

ROGERS MACHINERY, INC.,
Appellant/Petitioner,

v.

WASHINGTON COUNTY,
Respondent/Respondent,

CITY OF TIGARD,
Respondent/Respondent.

ORDER DENYING REVIEW

The Court has considered the petition for review and orders that it be denied.

DATE: August 13, 2002.

/s/ Robert D. Durham
ROBERT D. DURHAM
PRESIDING JUSTICE

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

[Filed Nov. 27 1998]

No. C971202CV

ROGERS MACHINERY, INC.,
Petitioner,

v.

WASHINGTON COUNTY and CITY OF TIGARD,
Respondents.

JUDGMENT

This Writ of Review came before this Court on November 5, 1998, for hearing on the merits before the Honorable Thomas W. Kohl. Petitioner appeared through its attorneys David Hunnicutt and Phillp Grillo. Respondent Washington County appeared through its attorneys Dan Olsen and Loretta Skurdahl. Petitioner City of Tigard appeared through its attorneys Charles Corrigan and Gary Firestone.

The Court, having reviewed the record and legal memoranda previously submitted by the parties, having heard argument of the parties, and being fully advised now, therefore, based on the Court's letter opinion attached as Exhibit 1,

IT IS HEREBY ORDERED AND ADJUDGED that the actions of Washington County, the City of Tigard, and the written decision of the hearings officer are affirmed. Petitoner's request for restitution and other relief is denied.

Judgment in favor of Washington County and the City of Tigard and against Rogers Machinery is hereby granted.

DATED this 27 day of November 1998

/s/ Thomas W. Kohl
THOMAS W. KOHL
Circuit Judge

APPENDIX D

[SEAL]

OREGON JUDICAL DEPARTMENT
WASHINGTON COUNTY TRIAL COURTS
TWENTIETH JUDCIAL DISTRICT
WASHINGTON COUNTY COURTS
145 N.E. Second Avenue
Hillsboro, Oregon 97124

November 16, 1998

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RE: *Rogers Machinery Inc v. Washington County and City of Tigard*

CASE NO. C971202CR

Dear Counsel:

I find the Washington County traffic impact fee ("TIF") is a tax that was validly imposed and adopted by Washington County as a county wide tax and approved by the voters in 1990. I further find that its purpose was to raise revenue for capacity increasing transportation improvements and that it was limited to that purpose only.

I find that *Dolan v. City of Tigard*, 512 US 374, 114 S.Ct 2309 (1994), is not applicable to the TIF. I further find that the TIF is compatible with the statutes related to the systems development charges.

Therefore, I affirm the actions of Washington County, the City of Tigard and the written decision of the hearing officer

There was an additional issue raised by the Plaintiff in regard to the increased tax that it had to pay due to the timing of the payment. I find that the additional tax imposed upon the Plaintiff was proper under the cirumstances.

Counsel for Defendants shall prepare a judgment accordingly.

Very truly yours,

/s/ Thomas W. Kohl
THOMAS W. KOHL Circuit Judge

cc: Dan Olsen

APPENDIX E

[Attachment "B"]

HEARING BEFORE
WASHINGTON COUNTY HEARING OFFICER

CASE FILE No. 97-164 Appeal

APPLICANT: Rogers Machinery Company

Proposed Development Action:
Appeal of Traffic Impact Fee Assessment

FINDINGS, CONCLUSIONS, AND ORDER

FINDINGS

1. The Applicable Regulations are those those set forth in, Paragraph 1 of the City of Tigard Staff Report of July 17, 1997. The Applicant is appealing the City of Tigard's assessment of a Traffic Impact Fee pursuant to Washington County Ordinance 379-Countywide Traffic Impact Fee ("TIF"), for a General Light Industrial Use, in the amount of $37,102. The Applicant contents that the City is required to establish the fee in proportion to the various uses on the Site. See page 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report. The Applicant also contents that there should be little or no impact fee because the Applicant is not moving new employees into either the new building or the existing building on the Site. See page 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report. The Applicant further contents that the TIF, as applied to its development, is an unconstitutional taking, based on the United States Supreme Court Holding in the case *Dolan v.*

City of Tigard, 512 US____, 114 S.Ct 2309, 129 L.Ed. 2d 304 (1994). Applicant argues that the fee bears no relationship to what is actually taking place at the Site.

2. The facts are undisputed. The Applicant is located in the City of Tigard. At its existing location it operates its Corporate Headquarters and its Portland Branch. The Corporate Headquarters includes sales, service, warehousing, accounting and production functions, which serve a nationwide distribution network and a regional branch system. The Applicant has branches in Seattle, Spokane, Boise, Portland, Centralia and Eureka. The Portland Branch includes sales, service and warehousing functions. As a natural part of the evolution of the Applicant's organization, it decided to create a separate building to house the Portland Branch and a Corporate Service Center. This new facility is to relieve overcrowding in the existing building. No new employees are anticipated or planned for the new or existing building. Approximately 40 employees will be moved from the existing building to the new building. To further relieve crowding of the existing facility, production of an entire line of compressors has been shifted to another location. A new computer system has been installed in an effort to accommodate more business without increasing employment. See page 1 and 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report and testimony of Walter Novac Vice President and Production Manager of Applicant.

3. Mr. Rager presented the Staff Report for the City of Tigard. He summanized the written Staff Report, a copy of which is in the record, including the reasons why the City of Tigard believes the assessment of a TIF for a General Light Industrial Use, in the amount of $37,102 was permitted under Washington County Ordinance 379. Mr. Jim Oliver, City Attorney for the City of Tigard summarized the City's position that the TIF was a tax; that if it was not a tax it is not an exaction under the *Dolan* test; and that if the TIF is an

exaction, it complies with the *Dolan* analysis. *See* Memo of July 9, 1997 Attachment 10 to the Staff Report. Mr. Scott King appeared on behalf of Washington County and referenced his memo of July 17, 1997, a copy of which is in the record. Ms Loretta Skurdahl, assistant County Counsel for Washington County appeared and summarized the County's legal position that the Countywide TIF is a tax. See Memo of July 10, 1997 Attachment 9 to the Staff Report.

4. Mr. Phil Grillo, counsel and Chris McKillop, corporate counsel appeared on behalf of the Applicant, Mr. Walter Novac, Vice President and Production manager was called as a witness. He testified that the Applicant has few walk in customer and was not planning to add any new employees. He stated that the purpose of the new building was to allow the Applicant to operate more efficiently. Chris Stanely of Kittleson and Associates testified that the City's classification of the Applicant's use. Light industrial, was incorrect because the Applicant's activities did not appeal to closely match light industrial activities. Mr. Grillo made legal arguments on behalf of the Applicant. Applicant's Exhibits 1 to 6 were offered and admitted into evidence.

5. The record was kept open until August 1, 1997 to allow the parties to submit rebuttal and arguments. Mr. Grillo submitted a memorandum dated August 1, 1997 on behalf of the Applicant. Ms. Skurdahl submitted a memorandum dated August 1, 1997 on behalf of Washington County. Mr. Oliver submitted a memorandum dated August 1, 1997 on behalf of the City of Tigard.

6. The Hearings Officer has reviewed the legal memorandums submitted by the parties. Although the law is less than clear, in the Hearings Officer's judgement the TIF is a tax and not a fee. It is a tax imposed upon new development in Washington County. The Applicant has received a building permit and is subject to this tax. On this issue the Hearings Officer concurs with the legal analysis set forth in the County

Counsel's memo of July 10, 1997 and August 1, 1997. See Memo of July 10, 1997, Attachment 9 to the Staff Report and Ms. Skurdahl's Memo of August 1, 1997 at pages 3 and 4.

7. In the Hearings Officer's judgement *Dolan* was based on a review of a local government's regulatory power, not upon a review of a local government taxing power and therefore does not apply.

8. Applicant makes an interesting argument that the TIF ordinance was preempted by state statute, ORS 223.297 to 223.314 addressing System Development Charges. *See pages 4 to 5 of Mr. Grillo's Memorandum of August 1, 1997.* In the Hearings Officer's opinion, the TIF ordinance is not pre-empted by state statute for the reason set forth in the County Counsel's memo of August 1, 1997. *See Ms. Skurdahl's Memo of August 1, 1997 at pages 1 and 2.*

9. Applicants argues that because it does not intend to hire new employees, it will generate no new trips. This argument seems reasonable. However the TIF is a tax based on the trip generation rate of a given land use sampling of like uses nationwide. *See Memo of Scott King of July 17, 1997.* Ordinance 379 provides for the calculation of the tax, TIF, in Section 3.17.050. That Section provides in part:

> "The amount of tax due shall be determined by multiplying the following applicable dollar amount by the number of average weekday trips generated by new or remodeled structures in accordance with the trip determinations set forth in Appendix "A" . . ." (emphasis added)

Appendix A sets forth certain Land Use Categories and trip generation rates for these categories. Significantly the ordinance does not allow either a government entity, or an applicant, to establish that the trip rates, set forth in Appendix A, are different than the actual trip rates, and to then use these actual rates in calculating the tax. Applicant and others

believe this system to be extremely unfair. It gives the appearance of unfairness because the TIF purports to be a tax for new traffic impacts generated by a development, but it can be imposed when the proposed use, such as in the instant case, will generate no new trips. The County would argue that the use of the buildings could change in the future. In drafting the TIF, the Commissioners could have used actual trip rates, or provided that the trip determinations, in Appendix A, could be changed upon proof of actual trip rates. However, the Commissioners did not adopt such language. The Hearings Officers has no authority to amend the Ordinance.

10. The Hearings Officer finds that pursuant to Section 3.17.050(C) the Staff should have appointed the new building. The Hearings Officer finds the TIF calculation should be appointed as set forth on page 6 of the Staff Report.

CONCLUSION

Based on the findings above the appeal should be denied except that the TIF calculation should be apportioned as set forth on page 6 of the Staff Report.

ORDER

The Appeal is denied except that the TIF calculation shall be apportioned as set forth on page 6 of the Staff Report.

Dated this 21st day of August 1997.

/s/ Dale M. Hermann
DALE M. HERMANN, Hearing Officer

APPENDIX F

3.17.010 Short title.

This chapter shall be known, and may be pleaded as, the Washington County traffic impact fee ordinance. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.020 Purpose and scope.

A. This tax is adopted to ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development.

B. This tax shall provide funds for extra capacity improvements to county and city arterials and certain collectors or state facilities. It applies throughout the county, including within incorporated cities. (Ord. 379 § 3(Exhibit A (part)), 1990)

3.17.030 Definitions.

As used in this chapter unless the context requires otherwise:

A. "Applicant" means the person seeking to obtain a building permit.

B. "Arterial" means that term as defined in the comprehensive plan.

C. "Base report" means the report dated August 1990 and adopted as Appendix D to the ordinance codified in this chapter and on file in the department of land use and transportation.

D. "Board" means the board of county commissioners of Washington County, Oregon.

E. "Building official" means that person, or his designee, licensed by the state and designated as such to administer the State Structural Specialty Code for the county or city.

F. "Building permit" means that permit issued by the county or city building official pursuant to the Uniform Building Code. In addition, "building permit" means the mobile home placement permit issued by the director, or his representative, on a form approved by the Department of Commerce of the state and relating to the placement of mobile homes in the county. For those uses for which no building permit is provided, the final approval granted by the jurisdiction approving the use shall be deemed a building permit for purposes of this chapter.

G. "Business and commercial" means that land use category as identified by those structures as shown in Appendix A attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

H. "City council" means the governing body of each incorporated city having jurisdiction over property within the boundaries of the county.

I. "Collector" means a nonarterial road or street designated on the base report adopted as Appendix D of the ordinance codified in this chapter, as amended.

J. "Comprehensive plan" means the comprehensive plan, transportation plan, capital improvements plan, public facilities plan or equivalent plan adopted by ordinance by the applicable jurisdiction.

K. "Construction cost index" means an annual construction cost estimate based on a composite of the unit costs for specified construction components of all accepted construction contracts entered into by the

Oregon Department of Transportation during a single year indexed to the quantity and total cost of such items for the years 1960 through 1962, inclusive, and computed using the formula set forth in Appendix B attached hereto, attached and by this reference incorporated herein.

L. "County" means Washington County, Oregon.

M. "Department" means the county department of land use and transportation, or, in those cities that have opted to collect and administer this tax, the department charged with the duties.

N. "Development" means any man-made change to improved or unimproved real estate which has the effect of generating additional weekday or weekend trips as determined in a manner set forth in Sections 3.17.050A or 3.17.050B whichever is applicable.

O. "Director" means the director of the department of land use and transportation, or in those cities that have opted to collect and administer this tax, the person designated by the city to so act.

P. "Extra capacity facilities or improvements" means those transit, arterial and collector improvements that are necessary in the interest of public health, safety and welfare to increase traffic capacity to address new development. Such improvements include, but are not limited to, signalization, channelization, widening, drainage work, pedestrian safety, lighting, acquisition of right-of-way and necessary easements, street extensions, railroad crossing protective devices, bridges and bike paths, and transit.

Q. "Fee" shall mean the traffic impact tax adopted herein.

R. "Industrial" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

S. "Institutional" means that land use category as identified by those structures shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

T. "Occupancy permit" means the occupancy permit provided for in the Uniform Building Code or other ordinance of the applicable jurisdiction. If no occupancy permit is provided for a particular use, the final inspection and approval shall serve as the occupancy permit.

U. "Offices" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

V. "Residential" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

W. "Road" means a county road or city street.

X. "Temporary construction facility" means those facilities needed on an interim basis for construction of specific uses, structures or road improvements, and which are intended to be discontinued when construction is complete. Such facilities include, but are not limited to, accessory construction structures, staging areas, parking, and park-and-ride lots in conjunction with construction of a facility.

Y. "Temporary use" means a use or structure on improved or unimproved real estate which is of impermanent nature, and is used for less than ninety days in a calendar year.

Z. "Traffic impact fee" means the tax imposed and required to be paid pursuant to this chapter. (Ord. 435 § 4(A), 1993; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.040 Imposition and exceptions.

A. A traffic impact tax is imposed on all development in the county, including inside cities, as provided for herein.

B. The following development is exempt from the tax:

1. Remodeling or replacement of any single-family structure (including mobile homes);

2. Multifamily structure remodeling or replacement except to the extent of addition of dwelling units;

3. Remodeling or replacement of office, business and commercial, industrial or institutional structures except to the extent it generates additional average weekday trips as determined in the manner set forth in Appendix A or as provided by Section 3.17.050(B) whichever is applicable;

4. Temporary uses which do not exceed ninety days in a calendar year;

5. Temporary construction facilities as determined by the director;

6. Development not subject to this chapter pursuant to Section 3.17.160 (Transition);

7. A transit improvement which has the impact of removing vehicle trips or reducing vehicle miles of travel on the county's major roadway system, as approved by the director;

8. Construction, remodeling or expansion of federal or state facilities and uses otherwise exempt from taxation by counties. (Ord. 435 § 4(B), 1993; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.050 Amount.

A. The amount of the tax due shall be determined by multiplying the following applicable dollar amount, adjusted as provided in subsection E of this section, by the number of average weekday trips generated by the new development in accordance with the basis for trip determination set forth in Appendix A attached hereto and incorporated herein.

Residential use	$135 per average weekday trip
Business and commercial use	$34 per average weekday trip
Office use	$124 per average weekday trip
Industrial use	$130 per average weekday trip
Institutional use	$ 56 per weighted average daily trip

The amount of the traffic impact fee for institutional uses shall be based on the weighted average daily calculated as follows:

(average weekday trip rate x 5) + (average weekend trip x 2)/ 7

B. In the event an identified use does not have a basis for trip determination stated in Appendix A, *i.e.*, not available, the director shall either:

1. Determine the trip generation based on the use listed in Appendix A most similar in traffic generation; or

2. At the election (and expense) of the applicant, consider actual trip generation of a same or similar use verified by a registered traffic engineer. In the event actual trip generation is utilized, the director may make such adjustments as he deems applicable in consideration of location, size and other appropriate factors in determining the average weekday trip.

C. It is recognized that single structures may include more than one use. In such event the director for purposes of establishing the traffic impact fee shall proportion the uses accordingly.

D. The applicant shall, at the time of application for a building permit, provide the department with necessary and applicable information, such as the type of use, number of employees or square footage of structures, necessary to calculate the traffic impact fee.

E. Notwithstanding any other provision, the dollar amounts set forth in subsection A of this section shall on May 1st of each year be computed to increase automatically by six percent unless the board of commissioners of the county first determines that the construction cost index is a more accurate estimate of the increase or decrease in construction costs. Upon such a determination, the amounts set forth in subsection A of this section shall be increased or decreased by the average percentage fluctuation of the construction cost index over the previous ten years. In no event, however, shall there be an annual increase in the excess of six percent. Notwithstanding the foregoing, all calculations shall be carried out to the hundredths place. A final product ending in $0.49 or less shall be rounded down to the nearest dollar, $0.50 or more up to the next dollar.

F. The construction cost index for 1986 and subsequent years shall be prepared by an Oregon registered professional engineer employed or retained by the county. The index shall be prepared in accordance with the formula set forth in Appendix B and generally accepted construction cost indexing standards. The Oregon Highway Composite Construction Cost Index for the fourth quarter of 1985, attached to the ordinance codified in this chapter and by this reference incorporated herein as Appendix C, is adopted as the

composite index for the years 1975 through 1985 to be used in computing the average percentage increase or decrease over the previous ten years.

G. Washington County promptly shall notify each city in writing of the increase or decrease. The adjustment to the dollar amount as described above apply to all building permit applications accepted for review on or after July 1st, by the county or city having jurisdiction over the development.

H. The decision of the board, including the accuracy of the construction cost index and its application, shall be reviewable solely under ORS 34.010 through 34.100, relating to writs of review, in the Circuit Court in the county. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.060 Payment.

A. Unless deferred, the tax imposed is due and payable at the time of issuance of a building permit by the county or city. Except as otherwise provided in this chapter, no building permit shall be issued for a development subject to this tax unless the tax is first paid in full.

B. Notwithstanding subsection A of this section, in those cases where the amount due for any one building permit exceeds five thousand dollars, the applicant may request a payment deferral. The request must be made in writing to the director no later than the time of application for a building permit. The director shall grant deferral to the traffic impact fee, however, any traffic impact fee shall be paid in full prior to the issuance of an occupancy permit. The amount of TIF due on deferred obligations shall be the amount in effect at the time of issuance of the occupancy permit. Deferred TIF obligations shall not be eligible for internal financing or bancrofting as provided in subsection C unless so requested at the time of application for deferral. Selection of the credit or

offset option must be made at the time of application for deferral. Failure to specify shall be deemed to be selection of the credit option. The selection is irrevocable.

C. Any traffic impact fee may be eligible for internal financing or a bancrofting agreement pursuant to ORS 223.205 through 223.785, the Bancroft Bonding Act or any adopted city process. Bancrofting and installment payment agreements, as allowed herein, shall be limited in term in the following manner:

Traffic impact fee through $1,000 . . . . . 3 years

Traffic impact fee from $1,001 through $5,000 . . 5 years

Traffic impact fee $5,001 and more . . . . . 10 years

Any installment or bancroft agreement provided by this section shall have an interest rate as determined, at the time of the application, by the chief county or city financial officer and in recognition of the then current market rates and costs associated with the administration of such agreements. Applications for an agreement, as provided in this chapter, must be made at the time of building permit application, or occupancy permit if permitted pursuant to subsection B of this section.

No applications made subsequent to issuance of the building permit, or occupancy permit if allowed by subsection B of this section, shall be considered. Any traffic impact fee using an agreement shall be a lien pursuant to ORS 223.230 or city provision. No offset shall be allowed for any tax satisfied through use of an agreement provided in this section. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.070 Credit.

An applicant for a building permit, or occupancy permit if deferral has been granted, shall be entitled to a credit against the tax for constructing eligible capital improvements as defined herein.

A. An extra capacity road or transit improvement is eligible for credit provided it meets all of the following:

1. With the exception of eligible transit improvements, the improvement must be on a facility designated as an arterial or collector facility in the base report, adopted as Appendix D as part of the ordinance codified in this chapter, and incorporated as if fully set forth herein.

2. The improvement must be designed and constructed to provide additional capacity to meet projected future transportation needs. Improvements that address capacity deficiencies existing at the time of development are not eligible. In the case of improvements addressing both, only that portion providing future capacity is eligible; and

3. The director determines that the timing, location, design and scope of proposed improvement is consistent with and furthers the objectives of the capital improvements program of the jurisdiction and, either;

4. a. The improvement is required to fulfill conditions of development approval issued by the jurisdiction with land use decision making authority; or

b. The improvement is within the impact area of the development. For purposes of this section, impact area is that geographic area determined by the director in which the estimated traffic to be generated by the development exceeds ten percent of the existing average daily traffic. Existing traffic volumes shall be those observed within six months prior to filing the development application, adjusted for daily and seasonal traffic variations using factors provided by the director.

B. A road or transit improvement constructed to address a safety hazard is eligible for credit if it meets the following:

1. With the exception of eligible transit improvements, the improvement must be on a facility designated as an arterial or collector in the base report; and

2. The improvement must have been mandated as a condition of development approval and be located within the impact area of the development, as determined pursuant to subsection (A)(4)(b) of this section.

C. Credit eligibility shall be determined by the director. In addition to meeting the standards of subsections A and B of this section, the following shall control:

1. There shall be no credit for improvements to the center twenty-eight feet of an existing road, except safety improvements creditable under subsection B of this section.

2. New roads are eligible projects as long as they meet the remaining project eligibility criteria. An existing dirt of gravel road is deemed new if its daily traffic volume is below two hundred vehicles per day. For new facilities, TIF credits may be issued for the entire roadway width.

3. Improvements which primarily function as access to a private street or driveway are not eligible.

4. Improvements, including travel lanes and bike lanes, must be at ultimate alignment, line and grade except that said improvements need not be at ultimate alignment, line and grade if the improvement is a safety improvement as provided in subsection B of this section.

5. Bike lanes are eligible only if required pursuant to an adopted comprehensive plan.

6. For intersection signals and related devices, only fifty percent of extra capacity or safety intersection improvements shall be eligible if the intersection involves one eligible and one noneligible road. Two-thirds shall be eligible in the case of a T-intersection involving an eligible through road only. One-third shall be eligible in the case of a T-intersection involving a noneligible through road.

7. Transit extra capacity or safety capital improvements such as bus shelters, turnouts, park and ride lots may be eligible if approved by the appropriate transit authority. No transit credit shall exceed ten percent of the TIF due.

8. No credits shall be issued for landscaping, street lighting, storm sewers, sidewalks, and erosion control; or sound walls, berms or other such mitigation devices.

9. Road right-of-way required to be dedicated pursuant to the applicable comprehensive plan or development condition is not creditable. The reasonable market value of land purchased by the applicant from a third party to complete a required off-site improvement is creditable.

10. No credit shall granted for utility relocation except for that portion which otherwise would have been the legal obligation of the jurisdiction pursuant to a franchise, easement or similar relationship.

11. No credit shall be granted for minor realignments not designated on the comprehensive plan.

12. No more than 13.5 percent of the total eligible construction cost shall be creditable for survey, engineering, and inspection.

D. All requests for credit vouchers must be in writing and filed with the director not more than ninety days after acceptance of the improvement. Improvement acceptance shall be in accordance with the practices, procedures and standards of the applicable jurisdiction. The amount of any credit shall be determined by the director and based upon the subject improvement construction contract documents, or other appropriate information, provided by the applicant for the credit. Upon a finding by the director that the contract amounts exceed prevailing market rate for a similar project, the credit shall be based upon market rates. The director shall provide the applicant with a credit voucher, on a form provided by the department. The original of the credit voucher shall be retained by the department. The credit voucher shall state a dollar amount that may be applied against any traffic impact fee imposed against the subject property. In no event shall a subject property be entitled to redeem credit vouchers in excess of the traffic impact fee imposed. This paragraph applies only to issuance of credit vouchers and does not extend the deadline for credit redemption or otherwise modify the credit redemption deadline in Section 3.17.070F.

E. Credits shall be apportioned against the property which was subject to the requirement to construct an improvement eligible for credit. Unless otherwise requested, apportionment against lots or parcels constituting the property shall be proportionate to anticipated average weekday trips generated by the respective lots or parcels except for institutional which shall be based on a full week. Upon written application to the director, however, credits shall be reapportioned from any lot or parcel to any other lot or parcel within the confines of the property originally eligible for the credit. Reapportionment shall be noted on the original credit voucher retained by the department.

F. Any credits as provided in this chapter are assignable, however, they shall apply only to that property subject to the original condition for land use approval upon which the credit is based or any partitioned or subdivided parcels or lots of such property to which the credit has been apportioned. Credits shall only apply against traffic impact fees, are limited to the amount of the fee attributable to the development of the specific lot or parcel for which the credit is sought and shall not be a basis for any refund.

G. Any credit must be redeemed not later than the issuance of the building permit or, if deferral was permitted pursuant to Section 3.17.060, issuance of the occupancy permit. The applicant is responsible for presentation of any credit prior to issuance of the building or occupancy permit. Except as provided in Section 3.17.110, under no circumstances shall any credit redemption be considered after issuance of a building permit or, if deferral was granted, issuance of an occupancy permit.

H. Credit vouchers shall expire on the date ten years after the acceptance of the applicable improvement by the appropriate jurisdiction. No extension of this deadline shall be granted.

I. Upon annexation, credits previously issued by the county shall be honored by the jurisdiction collecting the tax provided they are redeemed timely. (Ord. 465 § 4(A), 1995; Ord. 435 § 4(C), 1993; Ord. 398 § 4(A), 1991; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.080 Offset alternative for certain safety improvements.

A. In lieu of a traffic improvement credit from the director, a developer may choose to receive a dollar-for-dollar cash offset. This offset shall be available only against the cost of traffic safety improvements which would otherwise be eligible for a credit as provided in Section 3.17.070. If TIF

deferral is sought pursuant to 3.17.060(B), the offset option must be selected at the time of application for deferral. Failure to do so means the offset option is waived.

B. To obtain offset payments, the developer shall file a written request, on a form approved by the director, for an offset in-lieu of credit. This request must be filed within ninety days of acceptance of the improvement by the district and include the cost information required by Section 3.17.070(D). Eligible traffic safety costs of a development may be subject to offset or credit, but not both.

C. The amount of cash offset shall be calculated by the director in the same manner as provided in Section 3.17.070(D) for a credit.

D. The director shall establish an offset account sufficiently identifying each developer and development for which an offset has been requested. As cash taxes are collected for the development, the taxes shall be deposited into the account until sufficient funds are deposited to reimburse the developer for the full amount of eligible improvement costs. No interest shall be due or payable on the funds in the account. Traffic impact feet moneys paid in excess of the offset amount shall be deposited in the traffic impact fee fund. No offset funds shall be made available for traffic impact fees satisfied by use of credits or made subject to a bancroft agreement.

E. Beginning January 2, through and including five p.m., January 31st of each year, the developer who actually incurred eligible traffic safety improvement costs may file a written claim for offset moneys placed in the account for the subject development during the preceding calendar year. The claim shall be on a form approved by the director. No claim for offsets shall be accepted or processed after this deadline. For purposes of this section, an offset request is timely filed if postmarked January 31.

F. Within thirty days of receipt of a claim for offset, the director shall verify eligibility and issue payment to the claimant for the eligible amount expended as of December 31 of the previous year, less an administrative fee of three percent of the offset amount to a maximum administrative fee of two thousand dollars per account per year. In no event shall the payment exceed the amount of traffic impact fee moneys actually received during the previous year from the development conditioned to make the eligible safety improvement. In no event shall payment exceed the approved cost of eligible safety improvements. Any unclaimed balance remaining on February 1st shall not be eligible for offset and shall be transferred to the traffic impact fee fund.

G. Traffic safety improvement costs shall be eligible for offset for up to ten years after the assurance is provided. Offsets can no longer be claimed after January 31st of the tenth year following acceptance of the assurance, regardless of whether TIF revenues may continue to be generated by the development of whether the improvement has been completed. Remaining revenue shall be deposited in the TIF fund.

H. Offsets are nontransferable and nonassignable. They shall apply only to that property subject to the original condition for land use approval upon which the offset is based. Offsets shall only apply against traffic impact fees, are limited to the amount of the tax attributable to the development for which the offset is sought and shall not be a basis for any refund. (Ord. 465 § 4(B), 1995; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.090 Dedicated fund.

A. The county and each city shall create a dedicated fund entitled "traffic impact fee fund," herein "fund." All moneys derived from this tax shall be placed in the fund. Traffic impact fee revenue, including interest on the fund, shall be

used for no purpose other than those activities described as, or for the benefit of, extra capacity facilities as defined herein.

B. Moneys received from payment of traffic impact fees subject to offset shall be placed in an account identifying the developer and development conditioned to make the eligible safety improvement. Moneys received in excess of that required to honor offsets shall be placed directly in the fund. In addition, funds remaining due to unclaimed offsets shall be deposited in the fund upon expiration of the claim period. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.100 Use of TIF revenues.

A. TIF revenues may be spent to provide new or expanded arterial and collector projects as shown in the base report and extra capacity transit projects including all related improvements necessary to meet adopted standards. In addition, the reasonable and customary costs of administering this tax and projects funded hereunder, including repayment of debt, may be paid from TIF revenues.

B. Notwithstanding subsection A of this section, the following limitations apply:

1. For expansion of existing roads, except realignments of existing roads to fulfill an adopted transportation or capital improvements map, no TIF revenues shall be expended on the center twenty-eight feet;

2. The sum of ten dollars per trip generated from development of properties inside the jurisdiction of a transit district, increased annually as provided in Section 3.17.050(E), shall be reserved for extra capacity transit improvements; and

3. Except as provided in subdivision 4 of this subsection, fifty percent of all revenues, net of credits and the transit apportionment, annually collected by each

jurisdiction shall be reserved for use only for arterials designated in the base report adopted herein. Such funds may be used for collectors only if the county certifies that all necessary extra capacity improvements to arterials in the base report have been assured. "Assured" means completed or that funds have been set aside in the form of cash, cash- in-escrow, letters of credit or similar binding obligation acceptable to county.

4. Notwithstanding subdivision 3 of this subsection, the county and a city may by intergovernmental a agreement allow TIF funds to be spent on a specific collector project within the city or which directly benefits the city regardless of whether nonassured arterial needs exist.

C. TIF revenues shall be spent on improvements within the boundaries of the jurisdiction in which the tax was collected or which directly benefit the jurisdiction. In those cities which have not opted to administer this tax, taxes collected by the county building permits issued by the cities shall be spent only on county arterials and major collectors within or directly benefiting the city until such time as the county certifies that all extra capacity needs on such facilities have been assured. Upon certification, the county may spend the funds on any county arterial or major collector. Taxes collected by the county from properties within an acknowledged urban planning area shall be spent by the county only within that area or to directly benefit that area until the county formally certifies that all county arterial and major collec tor needs have been met, at which time the funds may be spent on any county arterial or major collector. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.110 Refunds.

Refunds of traffic impact fees may be made upon initiation of the director or upon written application filed with the director. Refunds shall be allowed upon a finding by the

director that there was clerical error in the calculation of the traffic impact fee. Refunds shall be allowed for failure to redeem a credit voucher or offset provided the claim for refund is in writing and actually received by the appropriate jurisdiction within thirty days of the date of issuance of the building permit or occupancy permit if deferral was granted. No refund shall be granted for any reason other than those expressly provided for herein. (Ord. 435 § 4(D), 1993: Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.120 Administration.

A. Except as provided in subsection B below, proof of payment of the tax to the county shall be required prior to issuance of a building permit or occupancy permit if deferred, for any development in the county, including any incorporated city.

B. Each city shall be entitled to collect the tax and administer this chapter within its city limits provided it files with the board of county commissioners a resolution or ordinance approved by the city council and containing the following:

1. Agreement to administer the tax in full compliance with its terms;

2. Acceptance of full and sole responsibility for proper administration in accordance with the chapter, including for any fund deficiencies notwithstanding termination;

3. A provision for ninety days notice of termination by city and an agreement to transition administration to the county in a reasonable and good faith manner.

C. Upon filing the ordinance or resolution, the city shall be entitled to retain one hundred percent of all tax revenues it collects to be used pursuant to this chapter. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.130 Collection.

A. Notwithstanding issuance of a building or occupancy permit without payment, the tax liability shall survive and be a personal obligation of the permittee.

B. Intentional failure to pay the tax within sixty days of the due date shall result in a penalty equal to fifty percent of the tax. Interest shall accrue from the sixty-day point at the legal rate established by statute.

C. In addition to an action at law and any statutory rights, the jurisdiction due the tax may:

1. Refuse to issue any permits of any kind to the delinquent party for any development;

2. Refuse to honor any credits held by the delinquent party for any development;

3. Condition any development approval of the delinquent party on payment in full, including penalties and interest;

4. Revoke any previous deferrals issued to the delinquent party, in which case the amount immediately shall be due, and refuse to issue any new deferrals;

5. Withdraw the amount due, including penalties and interest, from any offset account held by the jurisdiction for the delinquent party.

D. For purposes of this section, delinquent party shall include any person controlling a delinquent corporate permittee and, conversely, any corporation controlled by a delinquent individual permittee. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.140 Annual review.

A. The county annually shall review the traffic impact fee to determine whether additional tax revenues should be generated to provide extra capacity improvements needed to address new development or to ensure that revenues due not exceed identified demands. In so doing, the county shall consider:

1. Construction of facilities by federal, state or other revenue sources;

2. Receipt of unanticipated funds from other sources for construction of facilities;

3. New information provided by the Institute of Transportation Engineers adjusting trip rates; and

4. The impact of credits and offsets for safety improvements.

B. Upon completion of this review the county shall consider such amendments, including adjustment to the tax imposed herein, as are necessary to address changing conditions. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.150 Review of decisions.

A. Review of Expenditures.

1. Any citizen or other interested person may challenge an expenditure of TIF revenues as being in violation of this chapter provided a written petition for review is filed with the board of commissioners of the county within two years of the expenditure. The petition shall identify with reasonable certainty the expenditure, the relevant facts and the specific provision alleged to have been violated.

2. The board shall order an investigation and direct that within sixty days of receipt of the petition a written report be filed recommending appropriate action. Within

thirty days of receipt of the report, the board shall conduct a hearing to determined whether the expenditure was proper. At least ten days notice of the hearing, including a copy of the report, shall be mailed to the petitioner. Petitioner shall have a reasonable opportunity to present his or her position at the hearing.

3. The board may by resolution and order adopt rules of procedure governing the hearing including that the hearing may be continued if necessary to further address the issues.

4. The petitioner shall have the burden of proof. Evidence and argument shall be limited to grounds specified in the petition. The board shall issue a written decision stating the basis for its conclusion and directing appropriate action be taken.

5. Review of the board decision shall be as provided in ORS 34.010 to 34.100.

6. For purposes of this section, "city council" shall be substituted for "board of commissioners" if the petition arises from expenditures made by a city which opted to collect and administer this tax as provided in Section 3.17.110.

B. Review of decisions of the director:

1. Discretionary decisions of the director shall be in writing and mailed by regular mail to the last known address of the applicant.

2. Any person aggrieved by a discretionary decision of the director may appeal the decision to the county hearings officer. The appeal shall be in writing and must be filed with the director within fourteen days of the date the director's decision was mailed.

3. The appeal shall state the relevant facts, applicable ordinance provisions and relief sought. The appeal shall be heard by the county hearings officer in the same manner as provided for development permit applications. The county may by resolution establish a reasonable appeal fee.

4. The appellant shall have the burden of proving that an error was committed resulting in substantial prejudice.

5. The decision of the hearings officer shall be reviewable solely under ORS 34.010 through 34.100 in the Circuit Court of the county. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.160 Transition.

A. This chapter shall apply to issuance of building permits for all development for which a building permit application is received by the county, or any city, on or after the effective date. This shall not include resubmittal of building permit applications previously deemed incomplete if the requested information is submitted within one hundred eighty days of the date the application was first submitted.

B. Notwithstanding these amendments, and except as provided for credits in subsection C of this section, the prior provisions of the TIF shall continue to be fully applicable and shall govern all building permit applications received by the county prior to the effective date of the ordinance codified in this chapter. This shall include building permit applications previously deemed incomplete if the requested information is submitted within one hundred eighty days of the date the application was first submitted.

C. All deferrals, credits, offsets and brancroft payment agreements shall continue and be administered under the terms in existence when issued except that all credits and

offsets which have not previously expired, or which expired between the period on or after April 25, 1995 to the effective date of Ordinance 465, August 8, 1995, shall be valid for a period of ten years from the original date of acceptance of the improvement by the jurisdiction for credits and ten years from acceptance of the assurance for offsets. Repeal and enactment shall in no way impact any budget or appropriations, contracts, permits, condemnation proceedings or any other formal actions after pursuant to Ordinance No. 310 as amended and Ordinance No. 379 as amended. Repeal and enactment shall in no way impact any systems development charge, fee, or tax imposed by any city. This provision does not preclude any city from repealing or amending any such program, except that no credit or offset from TIF shall be granted against any credit or amount due city under a pre-existing program.

D. Notwithstanding any other provision, an extra-capacity improvement constructed inside the corporate limits of a city, which otherwise would not be eligible, shall be eligible for credits if all of the following conditions are met:

1. The facility is listed as an eligible arterial facility in the Base Report, as amended;

2. The improvements were completed on or after January 1, 1988;

3. The city finds that it represented to the developer that the improvements would be eligible for TIF credit upon adoption of county-wide TIF and finds that the developer relied on such representations;

4. The improvement met the eligibility standards for credits under the city systems development charge ordinance but the developer did not pay an SDC or receive credits under the SDC ordinance;

5. The developer files for a credit within ninety days of the effective date of the ordinance codified in this chapter.

Except as provided above, eligibility for, the amount of, and the duration of credits shall be determined in the same manner as for any other credit. (Ord. 465 § 4(C), 1995; Ord. 435 § 4(E), 1993; Ord. 398 § 4(B), 1991; Ord. 379 § 3 (Exhibit A(part)), 1990)

APPENDIX A

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Residential			
210 — Single-Family Detached Housing	Number of Units	10.0	
220 — Apartment	" "	6.10	
221 — Low-Rise Apartment	" "	6.60	
222 — High-Rise Apartment	" "	4.20	
230 — Residential Condominium	" "	5.85	
231 — Low-Rise Condominium	Not Available *		
232 — High-Rise Condominium	Number of Units	4.18	
240 — Mobile Home	" "	4.81	
250 — Retirement Community	" "	3.30	
260 — Recreational Home	" "	3.16	
270 — Planned Unit Development (Residential)	" "	7.44	
Institutional			
010 — Waterports Ship Berths	100.003 *		
020 — Airport	Not Available * *		
021 — Commercial Airport	Avg. Flights/Day	11.83 *	
022 — General Aviation Airport	" "	3.06 *	
030 — Truck Terminals	T.G.S.F.	9.86	
040 — Railroad Terminal	Not Available * *		
410 — Park	Parking Spaces	7.58	11.82
411 — City Park	Acres	3.66	33.58
412 — County Park	Acres	2.11	2.26
413 — State Park	Acres	1.05	1.78
420 — Marina	Boat Berths	3.00	5.55
430 — Golf Course	Parking Spaces	6.62	5.95
440 — Theater	Not Available * *		
441 — Live Theater	" " * *		

442 — Music Theater " " * *
443 — Movie Theater (sit down) Parking Spaces 6.191 7.181
444 — Drive-In Theater Not Available * *
450 — Stadium Parking Spaces 0.55 *
451 — Baseball/Football Not Available * *
452 — Horse Race Parking Spaces 1.08 *
453 — Auto Race Not Available * *
454 — Dog Race " " * *
460 — Camp " " * *
491 — Tennis Courts T.G.S.F. 32.93 23.80
492 — Racquet Clubs " 15.94 23.85
501 — Military Base Number of Employees 1.78 *
510 — Preschool Not Available * *
520 — Elementary School Number of Students 1.03 *
530 — High School " " " 1.39 *
540 — Junior/Community College " " " 1.55 *

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Washington County Code 3.17 Appx. A (Washington County 7-00)			
65			
550 — University	Number of Students	2.41 *	
560 — Church	T.G.S.F.	7.70	18.18
565 — Day Care Center	"	67.00	6.15
570 — Court	Not Available	* *	
571 — Prison4	"	* *	
580 — Museum/Gallery	"	* *	
590 — Library	T.G.S.F.	45.50	25.39
610 — Hospital	T.G.S.F.	16.69	11.29
620 — Nursing Home	Number of Beds	2.60	2.26

Business and
Commercial

310 — Hotel Number of Rooms 8.70
320 — Motel " " " 10.19
330 — Resort Hotel " " " 18.40
810 — Retail-General Not Available *

Merchandise

811 — Specialty Store " " *
812 — Building Materials/Lumber T.G.S.F. 30.56
813 — Lumber Not Available *
814 — Specialty Retail Center T.G.L.S.F. 40.68
815 — Discount Stores " 70.16
816 — Hardware/Paint Store T.G.S.F. 53.21
817 — Nursery " 36.17
820A — Shopping Center under
50,000 Gr.Sq.Ft. T.G.L.S.F. 94.71
820B — Shopping Center 50,000-
99,999 Gr.Sq.Ft. T.G.L.S.F. 84.512
820C — Shopping Center 100,000-
199,999 Gr.Sq.Ft. " 66.622
820D — Shopping Center 200,000-
299,999 Gr.Sq.Ft. " 53.622
820E — Shopping Center 300,000-
399,999 Gr.Sq.Ft. " 45.662
820F — Shopping Center 400,000-
499,999 Gr.Sq.Ft. " 41.412
820G — Shopping Center 500,000-
999,999 Gr.Sq.Ft. " 36.632
820H — Shopping Center 1,000,000-
1,200,000 Gr.Sq.Ft. " 32.822
820I — Shopping Center Over
1,200,000 Gr.Sq.Ft. " 32.382
831 — Quality Restaurant T.G.S.F. 95.622
832 — High-Turnover, Sit-Down
Restaurant " 100.003

833 — Drive-In Restaurant " 100.003
834 — Drinking Place Not Available *
841 — New Car Sale T.G.S.F. 47.52
842 — Used Car Sale Not Available *
3.17 Appx. A Washington County Code
(Washington County 7-00)
66

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
843 — Auto Parts Sale	Not Available *		
844 — Service Station	No. of Pumps	100.003	
845 — Tire, Battery and Accessory	Not Available *		
846 — Car Wash	Not Available *		
847 — Auto Repair	Not Available *		
848 — Highway Oasis (including truck fuel, minimal trucker and mechanical services)	" " *		
849 — Truck Stop (including food, auto and truck mechanical services, trucker supplies and trucker overnight sleeping accommodations)	Not Available *		
850 — Supermarket	T.G.S.F.	100.003	
851 — Convenience Market	" "	100.003	
870 — Apparel	" "	3.33	
890 — Furniture Store	" "	4.35	
895 — Video Arcade	" "	9.60	
911 — Bank (walk-in)	" "	100.003	
912 — Drive-In Bank	" "	100.003	

913 — Savings and Loan (walk-in) " " 61.00
914 — Drive-In Savings and Loan " " 100.003

Office

630 — Clinic T.G.S.F. 23.79
710A — General Office, Under 100,000 Gross Square Feet (G.S.F.) " 16.31
710B — General Office, 100,000-199,999 G.S.F. " 12.40
710C — General Office, 200,000-299,999 G.S.F. " 11.54
710D — General Office, 300,000-399,999 G.S.F. " 10.425
710E — General Office, 400,000-499,999 G.S.F. " 9.705
710F — General Office, 500,000-599,999 G.S.F. " 9.175
710G — General Office, 600,000-699,999 G.S.F. " 8.775
710H — General Office, 700,000-799,999 G.S.F. " 8.435
710I — General Office, 800,000 and Over " 8.165

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
714 — Corporate Headquarters Building	"	7.015	
720 — Medical Office Building	"	34.17	
730 — Government Office Building	T.G.S.F.	68.93	
731 — State Motor Vehicles Department	"	16.60	

732 — U.S. Post Office " " 86.78
740 — Civic Center " " 25.00
750 — Office Park USE General Office
760 — Research Center T.G.S.F. 6.09
770 — Business Park " 12.42
910 — Financial Not Available *
915 — Stockbroker " " *
916 — Lending Agency " " *
920 — Real Estate " " *
930 — Insurance T.G.S.F. 11.45

Industrial

110 — General Light Industrial T.G.S.F. 6.97
120 — General Heavy Industrial " 1.50
130 — Industrial Park " 6.97
140 — Manufacturing " 3.85
150 — Warehouse " 4.88
151 — Mini-Warehouse " 2.61
170 — Utilities Employees 1.07
180 — Agricultural Not Available *
860 — Wholesale T.G.S.F. 6.73

NOTES

* Not Available - Indicates that the ITE manual does not contain information for this use. Therefore, the basis for trip determination shall be as set forth
in Section 3.17.040(D).
1 Without Matinees
2 Note: Rate obtained by taking average of maximum and minimum rates of range
3 Note: Rate capped at 100.00
4 Note: Category may be used for permits submitted after January 5, 1996
TGSF - Thousand Gross Square Feet
TGLSF - Thousand Gross Leasable Square Feet
(Ord. 514A (Exhibit A), 1998; Ord. 500, Exhibit B, 1999)